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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 9

WILBUR C. KING, JERRY W. CARTER and RICHARD A. MACK, as and constituting the Florida Railroad and Public Utilities Commission,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of Florida

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Brief on Behalf of the State of Montana and the Board of Railroad Commissioners of the State of Montana, Amicus Curiae

---

ARNOLD H. OLSEN, *Attorney General of the State of Montana*

CHARLES V. HUPPE, *Assistant Attorney General*

EDWIN S. BOOTH, *Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana, and Special Assistant Attorney General of the State of Montana*

Attorneys for the State of Montana, Amicus Curiae

THUNDER'S HELENA

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PRELIMINARY STATEMENT

This case presents the question of the jurisdiction and authority of the Interstate Commerce Commission over Florida intrastate rates of rail carriers under the provisions of Sections 13 and 15a of the Interstate Commerce Act (49 USCA 13, 15a).

This brief, amicus curiae, is presented by the Attorney General of the State of Montana on behalf of the State and the Board of Railroad Commissioners of the State of Mon-

tana pursuant to paragraph 9 (d) of Rule 27 of this Court's rules. The Board of Railroad Commissioners is the administrative and regulatory board of the state charged with the duty of fixing and approving intrastate rail rates within the state. (Section 72-101 to 72-168, R. C. M., 1947). The Attorney General is designated as the attorney for the Board. (Section 72-124, R. C. M., 1947).

The State of Montana and its proper regulatory board files this brief, amicus curiae, for the reason that the decision in this case involving the intrastate rates of Florida will likewise involve the intrastate rates and the authority of the Interstate Commerce Commission (hereafter referred to as the Commission) over such rates in all other states, including the State of Montana. It is thought that the views of Montana may be useful to the court because of the nationwide effect the decision may have on state regulatory agencies in regulating intrastate rates and the authority of state and federal agencies.

Statements of the case will be contained in the principal briefs. We will therefore confine our references to the facts apparent in the Report of the Commission in *Increases in Florida Intrastate Rates*, 278 I. C. C. 41, (R. 80) and the decision of the United States District Court, Northern District of Florida, in *King, et al., vs. United States, et al.*, 101 F. Supp. 941 (R. 132). As appears in the report and opinion referred to, certain percentage increases had been allowed on interstate freight rates and charges by the Com-

mission in Ex Parte 162, *Increased Railway Rates, Fares and Charges,* 1946, 266 I. C. C. 537, and Ex Parte 166, *Increased Freight Rates,* 1947, 269 I. C. C. 33; 270 I. C. C. 81; 270 I. C. C. 93 and 270 I. C. C. 403. The Florida Commission, in a series of orders, had granted some and denied some of the percentage increases in effect on interstate traffic. Subsequently, the railroads filed a petition with the Commission under Section 13. This petition was assigned Docket No. 30140 and after hearing, the Commission issued its Report, referred to above, which was adverse to the Florida Commission in part. This proceeding was initiated to set aside the Report and subsequent order of the Commission. Montana's interest does not involve any particular rate levels or specific economic problems presented. The interest of Montana is confined to principles applicable on the application of Sections 13 and 15 of the Interstate Commerce Act, when an application for intrastate rate increases is in issue before the Commission. This brief will be so limited.

Further the interest of Montana in the question now before the Court is evidenced by the fact that a similar question has recently been decided by the United States District Court of Montana, in *Montana, et al., vs. United States, et al.* The decisions were rendered on July 24, 1952, and August 13, 1952, and are not yet officially reported, but are reproduced here as an appendix. A permanent injunction was issued preventing the Commission from increasing Montana intrastate rates. At this time, we are not advised as to whether the Montana case will be appealed. Should the case

be appealed many of the points involved will be similar to those raised in this case. Montana is thus vitally interested in principles which may be here established.

SUMMARY OF ARGUMENT

Point 1. Evidence of disparity of interstate rates over intrastate rates is not sufficient to show preference or advantage of persons and localities in intrastate commerce, or prejudice of persons and localities in interstate commerce. The preference and prejudice clause of Section 13 (4) is intended for the protection of persons and localities shipping in interstate commerce. It is not intended to be applied for the carriers' benefit. To permit the carriers to take advantage of this provision of Section 13 (4) would mean that absolute uniformity of rates was required. The Commission Report does not disclose shipper evidence adequate to sustain a statewide order increasing rates because of prejudice or preference, nor is disparity alone sufficient to support such an order on that basis.

Point 2. The evidence as to system revenue conditions and the fact that both interstate and intrastate traffic is handled in the same trains is insufficient to show revenue discrimination. The interstate rates, while declared to be maximum reasonable rates, are not specific reasonable rates and are not binding on the Commission or the carriers. These maximum reasonable rates would now be declared to be minimum rates for intrastate application. There is nothing to show that the intrastate rates cause any detriment to inter-

state commerce which would justify the Commission in increasing the rates. The report does not disclose facts showing, and there is no finding as to what amount of revenue the intrastate traffic should contribute in order to pay its fair share. The Commission's actions appear to be based on the assumption that intrastate rates may be increased on the sole basis of its findings relative to interstate traffic. The states would be deprived of authority over intrastate rates. The interstate maximum would become the intrastate minimum.

Point 3. The system passenger deficits should not be used as the basis for ordering intrastate freight rate increases. The authority over such questions as to interstate rates is separate and apart from the Commission's authority to increase state rates under Section 13 (4) because of the specific conditions there mentioned. Neither Section 15a or the National Transportation Policy declared by Congress amended or otherwise extended the authority over state rates set forth in Section 13 of the Act.

ARGUMENT

INTRODUCTION

This brief will discuss three principal points as shown in the summary. The relative limits of state and interstate authority over intrastate rates is common to all three points. No better or clearer statement of the principles to be applied in connection with Section 13 (4) of the Act can be found than this Court's statement in *North Carolina vs. United States*, 325 U. S. 507, 65 S. Ct. 1260, where it is stated:

"Section 13 (4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. * * * *No such breadth of authority is granted to the Commission over purely intra-state rates. Neither Section 13 (4) nor any other congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intra-state rates.* Since the enactment of Section 13 (4), as before its enactment, *a state's power over intra-state rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section.* When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

"Intra-state transportation is primarily the concern of the state. *The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation.* * * * * A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty'. * * * * *Before the Commission can nullify a state rate, justification for the 'exercise' of the federal power must clearly appear.'* * * * * And the intention to interfere with the state's rate-making function is not to be presumed, * * * * nor must its intention in this respect be left in serious doubt. * * * * *The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission.*" (Emphasis supplied)

Any interpretation of evidence or findings relating to increases in intrastate rates because of alleged unlawful preference, prejudice or discrimination should be made in conformity with the above stated principles.

POINT 1.

DISPARITY BETWEEN INTRASTATE AND INTERSTATE RATES DOES NOT ESTABLISH PREFERENCE OR PREJUDICE WITHIN THE MEANING OF SECTION 13 OF THE ACT.

Section 13 (4) (Appendix p. 26) contains two conditions as to when the Commission may raise intrastate rates. If either of the conditions exist, the Commission may remove the detriment to interstate commerce by raising state-made rates. The first condition is when the state-made rate "causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand."

Examination of the Commission Report, supra, shows discussion of the disparity existing between interstate and intrastate rates on various class and commodity items. The only comment on evidence as to any testimony by a shipper that it is injured by the disparity is that of a cement company. The Commission states that the carriers' evidence of disparity and the evidence of this one shipper shows that intrastate rates are relatively lower and result in advantage to Florida intrastate points and serious disadvantage to interstate points. This evidence appears to be the sole basis for find-

ings 4 and 7 to the extent that they find undue preference or advantage to intrastate traffic and undue prejudice to interstate traffic.

The District Court in this case, supra, did not follow the Commission as to prejudice and preference. The Court stated,

> "While it is doubtful if the Order of the Interstate Commerce Commission in No. 30140, could be sustained, on the grounds that the action of the Florida Commission resulted in undue and unreasonable advantage, preference or prejudice, as between persons and localities in intrastate commerce in Florida on the one hand and interstate commerce on the other * * *"

The Court then proceeded to decide the case on the basis of revenue discrimination.

On the basis of the report of the Commission, we think the lower court was right in refusing to uphold the Commission as to preference and prejudice. The Montana District Court in its first opinion of July 24, 1952, (Appendix p. 28) found that similar evidence contained in the Commission Report in *Montana Intrastate Freight Rates and Charges*, 284 I. C. C. 167, was insufficient to support a statewide order increasing rates because of preference and prejudice. After further argument, the Montana Court again discussed this question. (Appendix p. 60)

The Court said:

> "It will be noted that notwithstanding what the Supreme Court said in the Georgia Comm. case, supra, in North Carolina v. United States, supra, at page 513, the Supreme Court reaffirmed what it had said in Rail-

road Commission v. Chicago B. & Q. R. Co., 257 U. S. 563, to the effect that a general sweeping order against all intrastate rates may not be predicated upon findings of discrimination against particular localities and business groups made by the Commission under the clause about 'persons' and 'localities', which is a restatement of the Doctrine of the Shreveport case, 234 U. S. 342. As stated in Railroad Commission v. Chicago B. & Q. R. Co., supra: 'In such a case, the saving clause by which exceptions are permitted, cannot give the order validity.' "

In a very comprehensive review of authority under Section 13 of the Interstate Commerce Act, this Court in *North Carolina vs. United States, supra,* speaking of prejudice against interstate traffic, said:

> "In effect, the Commission's holding was, and its argument is here, that Section 13 (4) automatically requires complete uniformity in intra-state and interstate rates. That argument is in short that under our national transportation system interstate travelers and intra-state travelers use the same trains; for a state to fix a lower intra-state rate than the interstate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against the interstate passengers. *If Congress intended to permit such an oversimplified form of proof to establish 'unjust discrimination', then its requirement of a 'full hearing' was mere surplusage.* In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intra-state rates shall never be lower than interstate rates. *The argument of the Commission in this regard runs counter to the language of Section 13 (4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation.*
>
> * * * * *

"In Wisconsin Railroad Commission v. C. B. & Q. R. R. Co., 257 U. S. 563, 579, 580, 42 S. Ct. 232, 234, 235, 66 L. Ed. 371, 22 A. L. R. 1086, this Court refused to sustain a Commission order nullifying all state passenger rates because of a discrimination against interstate travelers and against localities. The Commission had found there as here that state and interstate passengers rode on the same trains in the same car and perhaps in the same seats. It had found there, as it did here, that this constituted an undue discrimination against interstate passengers, and it issued a general sweeping order against all intra-state passenger rates. This Court pointed out that the order went far beyond the principles announced in the Shreveport case, and declined to sustain the statewide order on this phase of the case. See also Florida v. United States, 282 U. S. 194, 208, 51 S. Ct. 119, 122, 75 L. Ed. 291. *So here, the finding that interstate passengers paid higher fares than intra-state passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers.*" (Emphasis supplied)

See also:

Wisconsin Railroad Commission vs. C. B. & Q. R. R. Co., 257 U. S. 563, 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086.
Florida vs. United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291.
Florida vs. United States, 292 U. S. 1.

The rule that in order to justify a finding of prejudice and preference under the Interstate Commerce Act, the evidence is required to show detriment to persons or localities in interstate commerce has been repeatedly followed by the Commission. In *Dewey Portland Cement Co. vs. Atchison T. & S. F. Ry. Co.*, 174 I. C. C. 87, 105, the Commission said:

"It is well settled, however, that a mere difference in rates is not enough to establish a case of undue prejudice to interstate shippers or unjust discrimination as against interstate commerce. There must be more; for instance, a further showing that the difference in rates, actual or relative, *is the moving factor in creating undue prejudice to competing shippers in interstate commerce or in casting an undue burden upon or obstructing such commerce.*" (Emphasis supplied)

And in *Intrastate Rates in New Jersey,* 203 I. C. C. 357, 360, the Commission said:

"To show that the rates prescribed by the New Jersey board would be prejudicial to shippers and localities in interstate commerce respondents rely almost entirely on rate comparisons showing that the intrastate rates would be lower than certain comparable interstate rates prescribed in the Eastern case. For example, it is shown that from Martins Creek, N. J., to Jersey City, 80 miles, the prescribed intrastate first-class rate would be 52 cents, while the interstate rate from Portland, Pa., to the same destination for 78 miles is 54 cents. Many more examples of the same kind are set forth in respondents' exhibits. *Findings of undue prejudice and preference may not be predicated merely upon a showing of such disparities. The mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates,* Florida v. United States, 282 U. S. 194, 212. Shippers who presumably might be adversely affected by the differences stressed by respondents have manifested no concern over them, so far as the record shows, * * *." (Emphasis supplied)

See also:

Mutual Creamery Co. vs. American Railway Express Co., 132 I. C. C. 207, 211.

Associated Bristol Retail Coal Dealers vs. Southern Railway Co., 283 I. C. C. 387.

Dewey Portland Cement Co. vs. Alton E. R. Co., 176 I. C. C. 671, 685.

Emergency Freight Charges in Tennessee, 215 I. C. C. 229.

Rates on Raw Dolomite and Fluxing Stone in Ohio, 188 I. C. C. 495, 511.

Georgia Veneer & Package Co. vs. A. C. L. R. Co., 206 I. C. C. 566, 574.

Emergency Freight Charges in Minnesota, 210 I. C. C. 289, 292.

Increase in Montana Freight Rates and Charges, 255 I. C. C. 131.

Under Court and Commission opinions mere disparity in rates is insufficient to warrant findings of preference and prejudice, which would justify action under Section 13 (4) of the Act. The Commission Report shows nothing further, except as to limited testimony on cement and that testimony would be insufficient to support the statewide rate order made by the Commission. The carrier cannot take advantage of disparity of rates to show prejudice or preference. *To permit the carrier to take advantage of this provision would mean that absolute uniformity of rates is required. This is contrary to law.*

POINT 2.

THE COMMISSION REPORT DOES NOT DISCLOSE EVIDENCE SUFFICIENT TO SHOW DISCRIMINATION AGAINST INTERSTATE COMMERCE OR SUPPORT AN ORDER UNDER SECTION 13 RAISING INTRASTATE RATES.

The revenue needs discussed by the Commission in its Report, supra, disclose that the evidence is solely on a system basis. The figures used included intrastate service in other states as well as interstate. There is no evidence as to intra-

state expenses. The Commission found that both classes of traffic were handled in the same trains, and that transportation conditions incident to intrastate transportation are not more favorable and conditions in part of the state are less favorable than those within southern territory and between Florida and interstate points. (Finding 2). It further found Florida rates are abnormally low, are not contributing their fair share to the carriers' revenue needs, and that the burden cast upon interstate commerce was undue to the extent that intrastate rates are less than the level of increases approved interstate. (Finding 5). The Commission further found that the interstate rates are just and reasonable and intrastate rates increased to the same extent as interstate rates will not exceed a just and reasonable level (Finding 3) and that intrastate rates so increased will not contribute more than a fair proportion of respondents' total revenue. (Finding 6). The Commission then ordered intrastate rates raised as provided in the Report. A savings clause was inserted in the Report, which provides that the findings are without prejudice to the right of any party to apply for modification of any specific intrastate rate on the ground that it is not related to the interstate rates or charges on like traffic in such a way as to contravene the Act.

The District Court in this case, supra, stated that it thought the Commission Order complies with the requirements laid down by this Court in *North Carolina vs. United States*, supra.

The second condition referred to in Section 13 (4) (Appendix p. 26) when the Commission may raise intrastate rates is when such state-made rate causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." This clause relates to the revenue needs of the carrier.

Florida vs. United States, 282 U. S. 194.
North Carolina vs. United States; supra.

THE INTERSTATE RATES ARE NOT SPECIFIED REASONABLE RATES.

In the North Carolina case, supra, this Court said there was doubt as to whether the interstate fare had ever been fixed as the only reasonable rate. This same condition exists with reference to the interstate rates approved in the Ex Parte cases. In each of the orders in Ex Parte 162 and 166, supra, a finding was made that the "rates and charges increased as herein permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co. vs. Atchison, T. & S. F. Ry. Co.*, 248 U. S. 370". In 269 I. C. C. 33 (Ex Parte 166) the Commission commented on the right to award reparations if unjust or unreasonable rates result in damages. And in the final order in Ex Parte 166, 270 I. C. C. 403, 454, the Commission recognized the fact that some of the increases might disturb rate relations, and stated that the carriers had given assurance that adjustments would be made and that they expected full and prompt compliance with these representations.

The Commission refused to declare that the interstate rates are specific reasonable rates in the basic cases. It reserved the right to award reparations on any of the rates in the event of complaint. It specifically said that the carriers should make downward revisions in rates for the purpose of re-establishing rate relations or to retain traffic. Under these conditions and based on the Ex Parte Orders, it cannot now find as it did in Finding 3 of this case that the interstate rates are the reasonable and just rates. The most it could say is that, until proven to the contrary, the interstate rates are not above a reasonable maximum level. Nor does the Report, supra, disclose any other basis than the Ex Parte Orders on which the rates may be determined to be reasonable.

This case does not involve the reasonableness of the Commission's action in approving the interstate rates under Section 15a. It may be conceded that the interstate rates are not above reasonable maximum levels. The Commission report does not disclose any cost study or other evidence from which it may be determined that any state rate is less than compensatory or below a minimum reasonable level. *The interstate and intrastate rates may both be within the recognized "zone of reasonableness." United States vs. Chicago M. St. P. & P. Ry. Co.*, 294 U. S. 499, 506, 55 S. Ct. 462, 465. It is true that in Finding 5 the Commission stated that the Florida intrastate rates "are abnormally low". We are unable to find any comments in the report, other than disparity, which support this statement. Apparently, the attempt is

to make findings similar to those approved in *Florida vs. United States*, 292 U. S. 1. but in that case there were cost studies to support the finding that the rates were abnormally low, less than compensatory and insufficient to cover full cost of service. In the Montana Case, (Appendix p. 54), the Court said:

> "Here there is no finding as in Florida v. United States, 292 U. S. 1, 9, that the intrastate rate scale 'was abnormally low and less than reasonably compensatory' . . . . . 'insufficient under all the circumstances and conditions to cover the full cost of the service.' There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a 'zone of reasonableness.'"

The Commission action would make the maximum rates it approved, the minimum reasonable rates for the state. Notwithstanding the fact that the carriers may and are expected to adjust the rates to meet conditions, the state commissions would be denied the right to properly consider rates within their own boundaries. *The maximum interstate rate thus at the same time becomes the minimum intrastate rate.* While there will remain a zone of reasonableness for the carriers, such a zone would be eliminated for the states and only one rate will be permitted, i.e., the maximum reasonable rate fixed by the Federal Commission.

THERE IS NO EVIDENCE OR FINDING AS TO THE AMOUNT OF REVENUE REQUIRED FROM INTRASTATE SERVICE.

The Commission Report, supra, is based entirely on system cost figures and disparity in interstate and intrastate rates

existing because Florida did not grant all of the increases granted interstate. The Commission's action rests on its statement appearing in 278 I. C. C. 67, where it says:

> "Our power to require an increase in intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate. Respondents are not seeking an increase in the intrastate revenue sufficient to give them a fair return on the value of their property devoted to freight service but merely to secure a contribution to maintenance and operating costs, including taxes, more nearly proportionate to the contribution thereto made prior to the increases in Ex Parte No. 162 and Ex Parte No. 166. We may properly use such prior contribution as a valid criterion of fairness, in the light of which the Florida intrastate rates and charges in 1947 and 1948 afforded a disproportionately small share of the revenue required to meet the costs of the service in Florida."

This statement shows that the Commission is relying solely on disparity of rates and the erroneous principle that the rates must be maintained in an exact relationship. Such a principle is contrary to its own statement that the rates are maximum only and that carriers should make downward adjustments. The principle further presupposes uniformity of rates contrary to Section 13 and the numerous cases decided.

Florida vs. United States, 282 U. S. 194.

Florida vs. United States, 292 U. S. 1.

North Carolina vs. United States, supra.

The note of the Court appearing in the North Carolina case at 325 U. S. 514 shows that this Court recognized the changed rule of rate making by reason of the 1933 amendment to Section 15a. The note on page 515 of the same case shows that the Court does not consider *Illinois Commerce Commission vs. United States,* 292 U. S. 475, as controlling where a statewide order is concerned.

There is no evidence or finding as to how much, if any, revenue is needed from intrastate traffic in order to provide a fair share of the carriers' total income. There is no evidence or finding as to what amount of revenue was required to enable the railroads to operate efficiently. The only finding is in Finding 5 that intrastate rates are not contributing their fair share of revenue to enable the railroads to operate efficiently and profitably, and in Finding 6, that the intrastate rates, increased to like extent as interstate rates, will increase the railroads' revenue and constitute not more than a fair proportion of the railroads' total income. There is no reference to any evidence supporting these findings. The findings are similar to those made by the Commission in *Alabama Intrastate Fares,* 258 I. C. C. 133. This type of finding was condemned on appeal by this Court in the North Carolina case, as being insufficient when unsupported by evidence.

Montana vs. United States, appendix.

The findings are apparently based on the reasoning that the interstate rates having been increased, in order to prevent violations of the Interstate Commerce Act, the Com-

mission must apply the same increases to intrastate rates. So far as the matters involved in this case are concerned this would mean that there could be no disparity between the rates. *Such a conclusion is directly contrary to law.*

See:

North Carolina vs. United States, supra.
Illinois Commerce Commission vs. Thompson, 318 U. S. 675.
Florida vs. United States, 282 U. S. 194.
Wisconsin Railroad Commission vs. Chicago, B. & Q. Ry. Co., supra.

Prior rate comparisons would, of course, be admissible in evidence, but they are not the criterion or basis on which the Commission may supplant state-made rates. The prior relationship may have been proper and reasonable. The requested rates may not be above the maximum reasonable rate. Neither of these conditions, under the provision of the act or under these controlling decisions, justify the Interstate Commerce Commission in supplanting state rates on these grounds. The present relationships may still be proper and the rates still be reasonable. The Commission's statement gives emphasis to our contention that the findings are based on the mere existence of disparity in rates, which is not a sufficient ground. The Commission must find that the present state rates violate the Interstate Commerce Act and those findings must be based on proper evidence, not mere generalities, nor on a showing that the relationship in rates is not the same now as it was four years ago. The fact that the Interstate Commerce Commission, on the evidence before it, saw fit to increase interstate rates is not evidence that

the present state rates violate any provision of the Act. *To so find would be to hold that the Commission has full authority over state rates and the states have no authority except to grant administrative approval.* Such a contention is contrary to the provisions of the Act.

THE COMMISSION HAS ERRONEOUSLY CONSIDERED ITS AUTHORITY RELATIVE TO INTERSTATE RATES AS ALSO APPLICABLE TO INTRASTATE RATE ADJUSTMENTS.

As this Court pointed out in the North Carolina case, supra, the Commission has broad powers over interstate commerce. We have previously stated the limitations applicable to the Commission authority over intrastate rates. In connection with interstate rates, the Commission determines whether they are reasonable. They do not have such authority over intrastate rates. Only when the intrastate rate causes either one or both of the conditions referred to in Section 13 may the Commission fix state rates. An intrastate rate higher than the maximum reasonable rate cannot be ordered, but the Commission's authority is not to fix reasonable state rates. It can only remove the preference, prejudice or discrimination adversely affecting interstate commerce.

The Commission has apparently assumed that having acted on interstate rates under Section 15a that they have the same authority as to intrastate rates. In other words, they are deciding Section 13 cases on the same basis as they do interstate cases. Congress has never granted such authority and this Court has said the Commission does not have such

authority. *An order supplanting state-made rates must be based on "clear findings supported by evidence of each element essential to the exercise of that power by the Commission."*

North Carolina vs. United States, supra.
Montana vs. United States, appendix.
Florida vs. United States, 282 U. S. 194.

POINT 3.

SYSTEM PASSENGER DEFICITS SHOULD NOT BE CONSIDERED IN CONNECTION WITH THE QUESTION OF INTRASTATE FREIGHT RATES UNDER SECTION 13 OF THE ACT.

The District Court in this case stated at 101 F. Supp. 944:

> "We conclude from this evidence that the increases in rates authorized by the Interstate Commerce Commission in Docket No. 30140, were authorized chiefly because of losses resulting from passenger operations.
> * * *
> "The question therefore, before the Court is—may the Interstate Commerce Commission increase freight rates generally to enable the carriers to meet deficits incurred from passenger operations?"

The opinion of the Court shows that the three principal railroads sustained a loss of $21,000,000.00 for 1948.

The appellant will undoubtedly discuss the law as to passenger deficits in detail. We will confine our remarks to general principles.

A proceeding claiming violation of Section 13 of the Act does not affect or challenge the authority of the Commission over interstate rates. Whether under the Transportation Act of 1940 or Section 15a of the Act, the Commission may consider passenger deficits in fixing interstate rates is immaterial to the problem before the Court.

There is no breakdown or allocation of intrastate passenger revenues or expenses to total Florida traffic, or Florida intrastate traffic. The Florida interstate shipper is paying the higher interstate rates because of passenger deficits. The intrastate shipper should not have to pay for deficits from passenger operations when those deficits arise from interstate traffic, or from traffic in other states. What was said by the Court in the Carolina case as to insufficiency of evidence is even more applicable when considering passenger deficits.

The Court in considering the law relative to passenger deficits, 101 F. Supp. 944, commented on the fact that the cases relied on by the appellants here were decided prior to the passage of the National Transportation Policy. We think the Court was in error in considering the Transportation Policy of 1940 as having any effect on intrastate rates or Section 13 (4) of the Act.

Sections 1, 13 and 15a (49 U. S. C. 1, 13, 15a) of the Act were re-enacted in 1940 at the same time and in the same act as the National Transportation Policy was declared. Section 1(2)(a) provides that the Act,

> "shall not apply (a) To the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

Section 15a (2), (Appendix p. 26) amended in 1933, states:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall * * *"

The Commission has no jurisdiction over the reasonableness of intrastate rates. The quoted sections do not indicate any jurisdiction or implied jurisdiction over intrastate rates. Sections 13 (3) and 13 (4) (Appendix pp. 25, 26) were added by the Transportation Act of 1920. Section 13 (4) grants authority to the Commission to increase intrastate rates (within the limits of the "zone of reasonableness"), for the purpose of removing specified interference with interstate commerce. This Court in the North Carolina case held that before state rates may be increased by the Commission, the existence of one or both of the limitations in Section 13 (4) must be found to exist by specific findings supported by adequate evidence.

See also: *Florida vs. United States,* 282 U. S. 194.

The National Transportation Policy enacted in 1940 (Note preceeding 49 U. S. C. 1) lays down some general rules to be followed by the Commission. It does not propose to grant any additional jurisdiction to the Commission. Had Congress intended to change the interpretation placed on Section 13 (4) by this Court in the Florida case, supra, it could have done so by specific amendment in several different manners. Congress did not do so. We think this Court correctly stated the boundaries of the Commission authority over state rates in the North Carolina case.

CONCLUSION

It is respectfully submitted that the Commission acting under Section 13 (4) of the Interstate Commerce Act can

increase state rates only when there are specific findings supported by substantial evidence establishing the existence of the conditions referred to in the Section. There is no evidence referred to in the Commission Report which would be sufficient to support a statewide order increasing rates, either because of preference and prejudice, or undue discrimination. Intrastate freight rates may not be increased because of deficits from passenger service, particularly where such deficits are on interstate or other state traffic. Neither the National Transportation Policy of 1940 or Section 15a extends the authority of the Commission under Section 13 (4) over intrastate rates, and in the absence of evidence and findings specifically showing violation of that Section, the Commission may not alter intrastate rates, regardless of what it may have found as to interstate rates under other sections of the Act. It is respectfully urged that the judgment of the lower court should be reversed and the Commission permanently enjoined from increasing intrastate rates involved in this proceeding.

Respectfully submitted,

ARNOLD H. OLSEN, *Attorney General of the State of Montana*

CHARLES V. HUPPE, *Assistant Attorney General*

EDWIN S. BOOTH, *Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana, and Special Assistant Attorney General of the State of Montana*

APPENDIX

PROVISIONS OF THE INTERSTATE COMMERCE ACT

Section 13. (As amended June 18, 1910, February 28, 1920, August 9, 1935, and September 18, 1940) (U. S. Code, title 49, sec. 13).

(1) * * * * *

(2) * * * * *

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier, concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-

making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) *Whenever in any such investigation the Commission, after full hearing,* finds that any such rate, fare, charge, classification, regulation, or practice *causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,* which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (Emphasis supplied).

Section 15a. (Added February 28, 1920; amended, June 16, 1933, and September 18, 1940.) (U. S. Code, title 49, sec. 15a.)

(1) * * * * *

(2) *In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration,* among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (Emphasis supplied).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

STATE OF MONTANA, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND PAUL T. SMITH, LEONARD C. YOUNG AND AUSTIN B. MIDDLETON, as members of and constituting the Board of Railroad Commissioners of the State of Montana,

Plaintiffs,

and

AMERICAN CRYSTAL SUGAR COMPANY, THE GREAT WESTERN SUGAR COMPANY AND HOLLY SUGAR CORPORATION, THE MONTANA STOCKGROWERS ASSOCIATION, a corporation, AND THE MONTANA WOOLGROWERS ASSOCIATION, a voluntary association,

Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

and

INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Intervening Defendants.

NO. 586

Before POPE, Circuit Judge, and PRAY, Chief Judge, and MURRAY, District Judges.

PER CURIAM.

This is a proceeding under the provisions of Title 28, U. S. C., Sections 2321-2325, brought on the petition of the State of Montana and the Board of Railroad Commissioners thereof against the United States of America, seeking an injunction restraining the enforcement and operation of an order of the Interstate Commerce Commission authorizing the railroads mentioned in the order to establish and place in effect intrastate rates in Montana which will reflect in general an 8 per cent increase over those approved and permitted by the Board of Railroad Commissioners of the State of Montana for such intrastate traffic.

The proceedings before the Interstate Commerce Commission, here referred to as the Commission, which preceded those in which the order now under attack was made, the railroads operating in the State of Montana with other similar carriers were granted permission to establish a series of general increases in interstate rates. These were granted by the Commission in order to meet increased costs of materials, supplies, wages and other items entering into operating costs, which in general resulted from postwar inflationary trends. In Ex Parte 162, 266 I. C. C. 537, decided December 5, 1946, an increase of 20 per cent in interstate rates in western territory, which includes Montana, was granted, subject to qualifications not here material. In Ex Parte 166, 270 I. C. C. 81, decided December 27, 1947, the Commission granted a further interstate increase of 20 per cent. Following each of these increases, the railroads oper-

ating in Montana made application to the Board of Railroad Commissioners of the State of Montana, herein referred to as the Board, for like increases intrastate. Following the Ex Parte 162 order of the Commission, the Board granted like increases intrastate with minor exceptions. Similarly following the Commission's order in Ex Parte 166, the Board granted a corresponding increase as to intrastate commerce, except that as to sugar beets and livestock it limited the authorized increase to one of 10 per cent.

Thereafter on August 2, 1949, in a proceeding known as Ex Parte 168, the Commission granted a further increase in rates in interstate traffic in western territory of 8 per cent. These rates became effective September 1, 1949. Upon application to the Board for corresponding increases on intrastate traffic the Board refused to permit the increases. This refusal was followed by proceedings before the Commission instituted September 22, 1950, seeking an order from the Commission under Section 13 (4) of the Transportation Act of 1940 that intrastate rates in Montana be increased by the percentage authorized as to interstate rates, by the Commission in the earlier proceedings mentioned. The order there sought was granted and that is the order here in question.

The opinion and findings of the Commission, upon which its order is based, listed numerous instances of what the Commission found to be unjust discriminations between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand. These

instances thus listed by the Commission in the opinion which accompanies its findings, although considerable in number and although sufficient to warrant appropriate orders by the Commission increasing the particular intrastate rates which produced the unfair discrepancy, as the Commission is empowered to do under the Doctrine of the Shreveport Case, 234 U. S. 342, do not in our opinion support or warrant the order here in question, which "includes (rates) between all interior points although neither may be near the border and the (rates) between them may not work a discrimination against interstate (commerce) at all." Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563. There is evidence in the Commission's report that it recognized this limitation, for it expressly recited that its power to require the broad increase here ordered must be predicated upon other grounds, saying:

> "Our power to require an increase in intrastate rates and charges depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property devoted to the transportation service, both interstate and intrastate."

The State and the Board, while not questioning the power of the Commission to make an order requiring a state wide increase of intrastate rates in the circumstances stated in the quotation just made, say that the order here before us is invalid because the findings upon which it is based do not measure up to the "high standard of certainty" required in respect to such orders. North Carolina v. United States,

325 U. S. 507, 511. It is contended that there was no evidence to show that the intrastate rates must be increased 8 per cent or any other percent before such traffic would contribute "its fair share of the revenue required to enable respondents to render adequate and efficient transportation service." The State also urges that the findings lack a determination in this respect and says that before the Commission may make the necessary fundamental finding as to whether a fair share is being contributed, it must make inquiry into the costs of the intrastate commerce within Montana in relation to the state revenue and the costs and revenue from the entire system of each railroad. The Commission found that the segregation of such costs of handling intrastate traffic was impossible; that they could not be determined or segregated from the total cost incurred in handling all traffic.[1] The Commission arrived at its conclusion that the same 8 per cent increase must be added to the intrastate rates in order to bring them to the point where they would produce their fair share of the required revenue, by stating:

> "Increased costs are, however, as applicable in Montana as in any other place, *and on the assumption that the relationship of the Montana intrastate rates to the interstate rates prior to the general rate increase pro-*

---

[1] The report which accompanies the findings recited:

"As to whether the present intrastate rates in Montana are insufficient to cover the service performed respondents have been unable to determine the cost of handling intrastate traffic. It is virtually impossible to separate the costs in the various States from the total cost incurred in handling all traffic."

> *ceedings was proper,* the former should be increased to the same extent as the latter to maintain that relationship." (Emphasis added)

The State and the Board assert that the Commission may not properly make any such assumption. They say that this assumed proper relationship of intrastate and interstate rates prior to any of these increases is a matter of proof and of finding. The contention is that for aught that appears here, the intrastate rates which antedated any of these increases may have been disproportionately high, and that the effect of the last interstate increase may have operated to do no more than bring the two sets of rates into a just proportion.

A like question arose under very similar circumstances in the case of State of Montana v. United States, (1933) 2 Fed. Supp. 448, in which a three-Judge court, sitting in this district, was asked to enjoin an order increasing intrastate freight rates under circumstances very similar to those presented here. The opinion in that case expressly approved an assumption identical with that here drawn in question, and sustained the order there under attack. The Court said:

> "By reason of the presumption of regularity in official duty theretofore performed, it is to be assumed, even as it is unquestioned, that at the time of interstate increase ordered interstate rates and intrastate rates were in just relationship, a harmonious whole, each contributing its fair proportion of total revenues in discharge of their common obligation to adequately maintain the railroads and service in common used by interstate and intrastate commerce."

In respect to the particular argument here discussed, if the law now applicable be the same as that at the time of the decision of the case just cited, we would be constrained to follow that decision and to consider it dispositive of the point mentioned for the reason that the judgment in that cases was affirmed by the Supreme Court, per curiam, in Montana v. United States, 290 U. S. 593. Other decisions rendered about the same time would seem to indicate that in the situation in which the Commission here found itself it was unnecessary to segregate and separate intrastate and interstate costs and revenues where it appears that the conditions under which interstate and intrastate traffic moved are substantially the same with respect to all factors bearing on the reasonableness of the rate and the two classes are shown to be intimately bound together. Illinois Commerce Comm'n v. U. S., 292 U. S. 474, 483. Here the Commission has made findings, which we must accept, that the intrastate traffic and the interstate traffic are handled within Montana in the same trains, by the same crews and with the same facilities and that in the physical handling both are inextricably commingled. It found that both types of traffic moved under substantially similar conditions and the expense of handling the two classes is inextricably woven together. It found that an attempt to do the impossible, namely to show costs of intrastate service segregated from interstate costs, would serve no useful purpose.

These findings would appear to require a conclusion such as that arrived at in Illinois Commerce Comm'n v. U. S.,

supra, and in the three-Judge court decision from which quotation has been made, unless it can be said, as the plaintiffs here contend, that a different rule and a higher standard for findings upon this point is called for by what was said by the Supreme Court in North Carolina v. United States, supra.

In its discussion of the rules applicable to cases of this character, the Supreme Court in that case pointed out, clearly and emphatically, that since in a case of this character the Commission was moving into the field of intrastate transportation, which is primarily the concern of the State:

> "A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty'. Illinois Central R. Co. v. Public Utilities Commission, 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear'. * * * * The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission."

What was said in that case, coupled with the argument here, that the findings of the Commission now before us are as deficient as those which brought condemnation of the order in the North Carolina case has caused us much concern. The State argues that all we have here in addition to what appeared in the findings in the North Carolina

case is an assumption which has no relation to any facts in evidence. The State says that the Commission's findings disclose on their face that the prior relationship of the two classes of rates is merely assumed and not proven to have been right and proper.

We are constrained to hold that the North Carolina case did not undertake to change the law as it theretofore existed or to increase the requirements as to the Commission's findings. In the first place the language of the Court bears no evidence of an intent to establish a new rule. Furthermore, so far as this particular point is concerned, there were facts in that case which differ from the facts which were before the three-Judge court in State of Montana v. United States, previously cited. In the North Carolina case, it was pointed out that there was reasonable doubt as to whether the Commission had ever fixed as the only reasonable interstate rate the rate which was sought to be established intrastate. The Court dwelt at length upon the manner in which the Commission had authorized a charge of 2.2 cents per mile, but without a hearing or evidence or finding that the railroads needed this increase. These circumstances alone were sufficient to disclose the absence of a basis for the order relating to an intrastate carriage. Furthermore, the Court pointed out that at the time of the order under attack former deficits of the North Carolina railroads had been transformed by very large revenue increases into very substantial profits. The Court said that this showed that had the Commission made any findings on the subject at all, it might properly

have found that a much lower rate would have produced a fair intrastate contribution to revenues.

We think that it is obvious that in the circumstances of this case, where segregation of intrastate costs is found to be impossible, there would be no way in which the Commission could exercise its statutory power to make an order which will require intrastate rates to contribute their fair share toward the revenue required to maintain an efficient railroad system, if the method and procedure adopted by the Commission in this case is not permissible. We do not think that anything said in the North Carolina case could have been intended to have the effect of requiring an impossibility.

We are also impressed with the argument made on behalf of the Commission that the "just relationship" of interstate and intrastate rates mentioned in the opinion of Judge Bourquin in the three-Judge case previously cited may not only be supported by the presumption there mentioned, but that an inference to like effect may be drawn from the fact that for a considerable number of years intrastate rates subject to continuous regulation by the Board and interstate rates subject to continuous regulation by the Commission shook down and fell into a relationship each to the other, which was the result of both action and non-action by shippers, Board and Commission.

It may be argued that if this assumption is to be made in all such cases, then there is no purpose in the Act's re-

quirement of a hearing. If an increase in interstate rates percentagewise is always to be followed by a similar increase in intrastate rates, what remains to be heard? We think that the answer is that the presumption mentioned by Judge Bourquin and the inference from lapse of time to which we have referred is sufficient in the circumstances of practical impossibility to produce evidence of local costs sufficient to make a prima facie showing in respect to which the Board and the objecting shippers had an opportunity to offer evidence to the contrary,—if, for example, they were able to disclose that the prior intrastate rates were already disproportionately high. We think that in this connection we should say what the Supreme Court said in the somewhat different case of United States v. Louisiana, 290 U. S. 70, at page 79:

> "The case of the Louisiana rates was not alone before the Commission, and it should not be treated as though it were. A number of other states, contesting in the aggregate a wide range of rates, were heard at the same time. Had the Commission been required to go into the circumstances of each item with particularity the purpose of its original order would have been defeated. *It sufficed that the Commission found that Louisiana showed nothing in the circumstances of its agriculture and industry or its traffic conditions so different from the rest of the country as to lead to the conclusion that the intrastate rates, raised to the reasonable general interstate level, would not themselves be reasonable;* and that it saved the rights of interested parties to test the reasonableness of any individual rate." (Emphasis added)

Here we think it sufficed that the Commission's report and findings disclose that Montana showed nothing in the circumstances relating to its prior intrastate rates so different from interstate rates as to lead to the conclusion that raising intrastate rates in the same proportion as that applied to the interstate increase would be unreasonable or would not operate to bring about the result of securing a fair share of the required revenue from the local rates. We see no reason therefore for a departure from the views expressed in the three-Judge court case previously cited.

Our examination of the record in other respects has led us to grave doubt as to the sufficiency of the findings in another particular. As was said in the North Carolina case, supra, the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates (325 U. S. at page 516), and the standard for the Commission's determination in a case of this kind is not whether the intrastate traffic is contributing its fair share of the railroads' total revenue—the question is whether it is contributing its fair share "of the revenue required to enable respondents to render adequate and efficient transportation service".

In the North Carolina case, one of the defects in the Commission's findings was that "it made no finding as to what amount of revenue was required to enable these railroads to operate efficiently". We have examined the voluminous record before us with all the care and diligence which the time allowed has permitted us to exercise and we must say

that it now appears to us that the same deficiency exists in the findings attached to the order here under review. Undoubtedly the Commission properly took official notice in this hearing of its findings and order in Ex Parte 168, which immediately preceded the proceedings here under review. Davis on Administrative Law, 1951, Sec. 155, page 508. We have examined the order, findings and report in that matter in 276 I. C. C. 9. It is there found, or it may be inferred therefrom, that an increase in interstate rates of 8 per cent is required to produce sums sufficient to permit railroads within the western territory, which includes Montana, to procure the required amount of revenue. The statement is "the anticipated revenue from the increases in rates and charges herein authorized and found to be just and reasonable is necessary to aid petitioners in meeting these outlays". There follows the order for the 8 per cent increase in interstate rates. The record of those proceedings appears to us to be devoid of any statement or finding to the effect that the 8 per cent will be sufficient on the assumption that a like increase be procured thereafter in respect to intrastate rates. We find no statement of the total amount required for the maintenance of the necessary adequate services and the payment of a reasonable rate on the investment anywhere in that record, nor can we discover figures from which we might calculate for ourselves and determine whether the Commission intended to find that there was required an 8 per cent increase on interstate rates in addition to a contemplated or any increase on intrastate rates. If the Commission intended

any such conclusion, it most successfully refrained from disclosing it in writing. The Commission is not without experience in these matters and presumably had in mind that in its order referred to in Illinois Commerce Comm'n v. U. S., supra, at page 478, it had expressed its contemplation that the state commissions would bring intrastate rates into harmony with the interstate rates it prescribed. There one would find reason for an inference that the interstate rates prescribed were fixed at the rates allowed in contemplation of the procuring of like increases intrastate. We find no such help in the record here mentioned. Here the Commission has made no finding that when the interstate increases are collected the railroads will still be short of the required revenues whatever those may be. If, as these proceedings suggest, the interstate increase will take care of the unstated required amount, then an appropriate adjustment of the whole matter would appear to be not that required by this order, but rather a lowering of the interstate rates there fixed accompanied by an appropriate increase of the intrastate rates which then would result in an over-all across the board increase of something less than 8 per cent.

Nor does the order, findings and report now under review supply the missing facts or findings. Under the heading of "Respondents' property, investment and revenues", the report gives numerous figures as to the property investment of the Class I railroads serving Montana, ranging from 1929 to 1949. Also given are the rates of return for the same

periods showing a rate for 1949 substantially less than that predicted for the western territory railroads in Ex Parte 168 for that year, but this is followed by a statement that in the first quarter of 1949 these carriers had an operating deficit in excess of $5,000,000 as a result of unusually severe weather conditions in the areas served by them. It appears that in 1950, with the opening of Korean hostilities, operating revenues considerably increased. This portion of the report gives the deficit for 1949 in passenger operations, but gives us no assistance as to how this figure may be incorporated into a calculation which the Commission neglected to make for itself. The report states that as a result of questionnaires received from the carriers, it can conclude that due to the failure of the Montana Commission to grant the increases requested there has been a "total revenue loss" approximating $700,000 a year. The context shows that the loss here referred to is not an actual loss, but only a loss in the sense that it represents amounts which the carriers might have collected in addition to their actual collections had the requested intrastate increases been permitted. The Commission report, commenting on the arguments of the respondents in the proceeding before the Commission said:

> "They also take the position that rates and charges increased as sought will produce revenue necessary to enable them to maintain in the public interest adequate and efficient railroad transportation service at the lowest cost consistent with the furnishing of such service, as declared by Congress in the national transportation policy and in section 15a (2) of the act."

This does no more than to show that the respondents appreciated the questions involved in the proceeding, but it is not a finding by the Commission. The utmost extent to which the report and findings appear to go is in the statement:

> "The findings in Ex Parte Nos. 162, 166 and 168 authorizing increase in interstate rates and charges indicate that like increases ought to be made in intrastate rates and charges including those within Montana."

We are well informed by the Commission's order itself that it thinks these increases "ought to be made". But as stated in the North Carolina case, they cannot be made unless the Commission by appropriate findings based on evidence states *why* they ought to be made.

Before concluding we wish to add to the comments previously made with respect to the apparent insufficiency of the findings that we have noted that in its formal finding No. 4, the Commission stated that the Montana intrastate rates and charges "are not contributing their fair share to the revenues required by respondents to enable them to render adequate and efficient service and to operate profitably." This is precisely the conclusion reached by the Commission in the North Carolina case and is in large part in precisely the same language quoted by the Supreme Court at page 514 of 325 U. S., but this general conclusion of the Commission leaves us in the same predicament in which the Supreme Court found itself in that case. As the Supreme Court there said:

"This conclusion of the Commission, if based on findings supported by evidence, would justify its order."

The difficulty there was the same as our difficulty here, which is that so far we have been unable to discover such findings.[2]

If we had had adequate time to read more thoroughly the record before us so that we might say with perfect assurance that the essential findings here indicated to be lacking are not concealed in some obscure portion of the report, we would proceed to issue an injunction against the enforcement of the order. However, the point last discussed by us was not argued at the hearing and we think that fairness requires that the parties be heard upon this question. Accordingly, IT IS ORDERED that the submission of the cause heretofore made on July 21, 1952, be vacated and the cause be and the same hereby is set for further argument before this court

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[2] Another point seriously urged by the plaintiffs during the argument was that the interstate rates were not declared by the Commission to be the only reasonable rates, that they were merely maximum rates found reasonable; while the rates ordered as the intrastate rates within Montana were determined by the Commission to be minimum reasonable rates which the Board would be without power to decrease. It was pointed out that the carriers could at any time publish rates below the interstate maximums. It is said that if and when the carriers do adjust interstate rates accordingly, there will be no appropriate or proper relationship between the interstate rates actually charged, and the minimum intrastate rates here fixed by the Commission.

As of now it occurs to us that this objection may be answered by the phraseology of the Commission's finding No. 7, but this we think may properly be the subject of further argument at the hearing hereafter fixed.

at the court room at Helena, Montana, at the hour of 10:00 o'clock A. M. on Monday, August 11, 1952.

And for the reasons herein stated, which are hereby adopted as the findings of the Court in connection with the order hereinafter stated and made, the Court finds that for good cause shown the aforesaid order of the Interstate Commerce Commission should be stayed and its operation and enforcement restrained in its entirety, pending the final hearing and determination of this action as herein ordered, and it appearing to the Court that it is necessary that the operation of said order be stayed and suspended and that a temporary injunction issue to that effect, in order to avoid irreparable damage which will result if the order is not granted, in that a multitude of claims for refunds would result should said stay not be granted and the Court finally adjudge the order invalid, IT IS ORDERED that the operation of said Interstate Commerce Commission order be and the same is hereby stayed and suspended, and the defendants, their agents and all persons acting under them or pursuant to their authority be and they are restrained and enjoined from enforcing said order until the final hearing and determination of this action.

Dated this 24th day of July, 1952.

WALTER L. POPE
Circuit Judge

CHARLES N. PRAY
W. D. MURRAY
District Judges

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

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Defendant,

and

INTERSTATE COMMERCE COMMISSION, NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Intervening Defendants.

NO. 586

Before POPE, Circuit Judge, and PRAY, Chief Judge, and MURRAY, District Judges.

Upon further hearing held pursuant to the Court's order of July 24, 1952.

PER CURIAM.

In an opinion filed July 24, 1952, we stated the issues involved in this proceeding and our conclusions upon some of them. We called attention to the fact that the court was unable to discover that the Interstate Commerce Commission, here called the Commission, had made in connection with its order here under review, or in its proceeding designated as Ex Parte 168, which preceded the Commission's order relating to Montana intrastate rates, a finding which we felt was an essential prerequisite to the validity of such order. The apparent omission there referred to was the failure of the Commission to find the amount of revenue required from Montana intrastate traffic to enable the railroads operating in or through Montana to do so efficiently. Our reasons for considering such a finding essential and our inability to discover such finding were fully set forth in the former opinion and what was there said need not be repeated here.

Upon the further hearing then ordered counsel for the respective parties have been given an opportunity to discuss at length the questions which had troubled the court. Extensive briefs carefully prepared and able arguments on both sides have been of material assistance to the court and

we now proceed, starting where we left off in the former opinion, to discuss our views with respect to the matters which were reserved for further argument.

Counsel for the defendant, the Commission, and the intervening Railroads, have undertaken to make several answers to our inquiry as to where the missing finding could be found. Counsel for the Commission conceded that they are unable to point to any explicit statement in the report in Ex Parte 168 reciting in effect that the additional revenues necessary to permit the railroads to operate efficiently was such that there would be required not merely the 8 per cent increase in interstate rates there ordered but also a like increase in intrastate rates.[1]

The first contention made is that the intention of the Commission to make such a statement or to include a determination that its interstate increase was fixed at the amount of 8 per cent upon the assumption that a like increase would be obtained on intrastate rates may be gathered from certain press notices and from the Commission's annual report to Congress issued subsequent to the Ex Parte 168 order. On the day following the issuance of the interim increase order

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[1] The Commission says: "While we also are unable to point to any explicit statement to that effect in the report in Ex Parte 168, we would point out that there is also no language therein which would indicate that the Commission's findings were based upon a contrary assumption; that is, there is no finding or other statement to the effect that the requirements of the railroads would be met by the interstate increase only. We think that the Commission merely failed to state the obvious."

in Ex Parte 168, the Commission issued a notice to the public or press notice in which it said of the order and of the rate increase approved: "This estimate is based upon the assumption that corresponding increases will be made effective on intrastate traffic." A similar press notice was issued following a final order in that matter containing the statement: "These estimates assume corresponding increases in intrastate traffic." The final order in Ex Parte 168 was dated August 2, 1949. In its sixty-third annual report to Congress dated November 1 following, the Commission, with respect to the rate increases authorized in Ex Parte 168, said: "Based on the anticipated volume of traffic in 1949, our staff on December 29, 1948, estimated that the interim increases would yield a total of $425 millions additional revenue per annum to the class I railroads, provided corresponding increases are made effective simultaneously in intrastate traffic."

We think it is obvious that a finding wanting in the former report cannot be supplied from any such sources as those thus suggested. Aside from the wholly impracticable suggestion that interested parties might be required to wait from August 2, the date of the order, to November 1, the date of the annual report, to discover the essential finding, it is sufficient to say that under the provisions of Section 8b of the Administrative Procedure Act, (5 USC Sec. 1007b), all decisions of the Commission must "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or

discretion present on the record." We think it clear that the absent finding cannot be supplied by these press notices or the Commission's annual report.

Next it is argued that what we found missing both in the order here reviewed and in Ex Parte 168 is to be found in the Commission's findings in the earlier cases including Ex Parte 162 and 166. It is said that both the initial and the final report in Ex Parte 168 discloses that that proceeding was but a later phase of the readjustment of charges of the railroads incident to postwar economic changes. It is said therefore that the order in Ex Parte 168 must be read as though it had incorporated by reference certain findings and statements of the Commission in earlier orders which were explicit upon the point in respect to which the Ex Parte 168 order was silent.

The initial report in Ex Parte 168, (272 ICC, at page 698) stated: "This proceeding is a phase of the readjustment of the charges of rail carriers inevitably incident to the late World War and its economic aftermath. Accordingly, this report is to be read with our latest report (title 'on further consideration') in Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C., 403, and with preceding reports in that proceeding, and also with the reports in the earlier proceeding of a similar character, Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, the latest being found at 266 I. C. C. 537, and also reports in other proceedings involving the whole or major portions of the railroad rate

level, referred to in the two reports cited. The present proceeding may be considered in effect, if not in form, a part of the series . . ."

In the final report in Ex Parte 166, the Commission undertook to determine the reasonableness of the proposed increased rates for a constructive normal year and to estimate the traffic expected to move thereunder. In considering the revenue effects of rate increases authorized, the Commission said that the table of such increases "assumes increases to have been approved on intrastate traffic similarly to those upon interstate traffic in the same territory, for the whole time." The Commission also said in its report in Ex Parte 166: "This estimate is upon the assumption that timely similar adjustments will be made upon intrastate traffic."[2]

It is argued that an intention to include similar findings or statements in Ex Parte 168 is made manifest by the recital in the report in Ex Parte 168, that "We invited the cooperation of the State regulatory bodies as obviously State made rates would be involved." (272 I. C. C. at page 700.)

With respect to this argument that in effect the missing finding or statement was incorporated in Ex Parte 168 by

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[2] The report also recited that its computations "presuppose that generally similar increases will be permitted by State authorities on intrastate traffic, or may become effective otherwise." It also said: "Considering the entire record upon this feature of the proceeding we conclude that the orders heretofore entered, especially when action by the State authorities is finally completed upon the carriers' proposals, meet the emergency needs of the petitioning carriers, as shown by the record. . ."

the latter's reference to Ex Parte 166, we note that there is missing from the report in case No. 168 any general statement that everything said in Ex Parte 166 is now repeated in or intended to be a part of Ex Parte 168. Obviously the additional revenues called for by Ex Parte 168 are different in amount than those set forth in Ex Parte 166. The percentage of increase allowed is different. On the other hand, there were no doubt numerous reasons why the Commission in the opening sentence of its initial report in Ex Parte 168 should call attention to its earlier reports and should suggest that the later one be read with those which preceded it. There were numerous respects in which the later proceeding could be said to deal with problems mentioned in the earlier ones.

It seems to us that we would have to put a very strained construction upon these references in the initial report in Ex Parte 168 in order to arrive at a conclusion that they operated to bring about a statement in Ex Parte 168 of that which is clearly missing therefrom. Such a construction would be a strained one wholly apart from the inferences to be drawn from the fact that the Commission apparently deliberately made the finding or statement in one case and omitted to make the same finding in another case.

Our views as to the construction of the phraseology in the initial report in Ex Parte 168, which has here been urged upon us, cannot be better expressed than in the language of Mr. Justice Cardozo in U. S. v. Chicago, M. St. P. & P.

R. Co., 294 U. S. 499, 510, as follows: "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation or parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency."

The third argument made on behalf of the intervening Railroad defendants throws even further doubt upon the sufficiency of the Commission's findings. That argument in substance is that the finding which our former opinion declared missing was wholly unnecessary. It was contended that since the Commission in Ex Parte 168 and in the proceeding here under review found that the Railroads here affected required additional revenues at the time the application in Ex Parte 168 was presented, and since it found that the Montana intrastate rates are now on a lower level than the interstate rates now found reasonable, the fact that both kinds of traffic moved under the same conditions, with costs inextricably commingled, requires a conclusion that the

intrastate rates may be properly ordered brought in line with the interstate rates. Counsel who made this contention on behalf of the Railroads summarized his argument as follows: "I think it is clear from what I have said earlier that in view of the woefully inadequate revenues of the Montana lines, the low level of Montana intrastate rates, the fact that operating conditions are the same, that a contribution of no greater percent from Montana intrastate traffic than is currently being received from interstate traffic is not in excess of the amount needed by these lines to enable them to operate adequately and efficiently."

We find ourselves unable to go along with this argument. It appears to us to be an attempt to contend that the mere existence of a disparity between intrastate and interstate rates is sufficient to warrant the Commission to prescribe intrastate rates. We think it sufficiently settled that "the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." Florida v. United States, 282 U. S. 194, 211-212; North Carolina v. United States, 325 U. S. 507, 516. We think that counsel is attempting to sustain the order by what the Supreme Court called in the North Carolina case "a very simplified form of proof."

Here there is no finding as in Florida v. United States, 292 U. S. 1, 9, that the intrastate rate scale "was abnormally low and less than reasonably compensatory . . . . 'insufficient under all the circumstances and conditions to cover

the full cost of the service'." There is nothing in the record before us to disclose a finding that the increased interstate rates and the existing intrastate rates are not both within a "zone of reasonableness."[3]

But the very fact that this argument thus rejected by us has been made here, suggests the possibility that the Commission accepted and acted upon a similar view. When that is considered there is brought to mind a special and peculiar reason why "a high standard of certainty" must be required of findings in a case of this character. For, as stated by Mr. Justice Cardozo in U. S. v. Chicago, M. St. P. & P. R. Co., supra, at page 511, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." And as stated by Mr. Justice Douglas in U. S. v. Carolina Carriers Corp., 315 U. S. 475, 489, "An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain."[4]

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[3] The term is from U. S. v. Chicago, M., St. P. & P. R. Co., supra, at p. 506.

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[4] The court there said (p. 489): "Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.'"

We remain of the opinion, previously expressed, that the essential finding mentioned is lacking in the Commission's report and order.

Finally, the defendants ask us to hold contrary to what was said in the former opinion that the order of the Commission must be sustained on the evidence and findings with respect to preference and prejudice as between persons and localities. In presenting this argument defendants rely upon Georgia Public Service Comm. v. United States, 283 U. S. 765, 774, in which the Supreme Court said, with respect to a similar proceeding: "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings".[5]

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[5] The text quoted by defendants is as follows: "The appellants contend that the findings are unsupported by the evidence. When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. RAILROAD COMMISSION V. CHICAGO, B. & Q. R. CO., 257 U. S. 563, 579. Compare BEAUMONT, S. L. & W. RY. CO. V. UNITED STATES, 282 U. S. 74, 83. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief. Compare NEW ENGLAND DIVISIONS CASE, 261 U. S. 184; RAILROAD COMMISSION V. CHICAGO, B. & Q. R. CO., loc. cit. supra. The evidence was comprehensive in scope. It occupies 556 pages of the printed record; and there were besides 337 exhibits. The proof of the discrimination against interstate commerce was specific and typical, and was clearly sufficient to establish the undue prejudice to interstate shippers. Compare NASHVILLE, C. & ST. L. RY. CO. V. TENNESSEE, 262 U. S. 318; UNITED STATES V. ILLINOIS CENT. R. CO., 263 U. S. 515."

It is contended that the Commission's findings of specific instances of preference and prejudice worked against interstate transportation and in favor of comparable intrastate hauls are sufficiently numerous and sufficiently typical to warrant the general, state-wide rate order here involved.

So far as the Georgia Comm. case, supra, is concerned, we think that it does not constitute authority for such a position here. The order in the Georgia Comm. case had to do with rates on but four related products, namely, chert, clay, sand and gravel. The indication by the Supreme Court that typical instances of preference and prejudice, with respect to these few products, would justify a general order with respect to such products does not suggest to us that we would be warranted in holding that the few instances of preference and prejudice listed in the present report and order, relating in the main to petroleum products, sugar beets, livestock, cement, coal and ore and concentrates could be so typical of the shipments of manifold unrelated products as to constitute a basis for the order here in question. We can understand how the instances of preference and prejudice, in respect to shipments of petroleum products which are listed in the report, might well be so typical of all intrastate shipments of petroleum products that a general order increasing the rates on petroleum products might be sustained. That was the Georgia Comm. case. But we cannot perceive how findings of instances of preference and prejudice in the case of shipments of coal, petroleum products, cement and other items listed in the report could justify a

general order relating to shipments of books, paper, household goods, harnesses, farm machinery, paints, lumber and a mass of other items not mentioned in the Commission's report.[6]

To support their argument that the instances of preference and prejudice here involved were not only typical but numerous and of major importance, counsel have asked us to examine Exhibit 3, which was introduced in evidence before the Commission. This Exhibit, it is said, enumerates item by item numerous products in respect to which definite losses are asserted to have resulted from the failure to obtain the intrastate increases demanded. We have been supplied with what purports to be a copy of that exhibit, showing the amounts of claimed losses set opposite each of these items, the total aggregating $535,550.55, which would be a major portion of the $700,000.00 which the Commission found

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[6] In the argument considerable emphasis was placed upon the disparity between interstate and intrastate rates on sugar beets. Some Montana beet factories shipped a portion of their beets from other states, while others receive only intrastate shipments. In the case of each sugar mill, the farmer producers receive identical prices, whether the producer be within or without the State. It would appear that the main preference and prejudice, if any, operates against the sugar mill rather than the producer. But the owners of the sugar mills have all intervened here in support of the State. It is urged that the portion of Section 13(4), which authorizes the Commission to eliminate preference and prejudice as between persons and localities, is one enacted for the benefit of shippers and not the carriers, and that so far as the sugar beet industry is concerned the carriers are not in a position here to claim any advantage from the existence of any disparity in rates as to sugar beets. We find it unnecessary to express an opinion upon this point.

might have been procured by the Montana intrastate increases. It is sufficient to say that to arrive at any such figures we would be obliged to delve into the record and go behind the Commission's findings. Under these circumstances "We are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body * * *" Florida v. United States, 282 U. S. 194, 215.

We find also that many of the Commission's findings, with respect to preference and prejudice as between persons and localities, lack sufficient definiteness and specificity to be significant. Thus the Commission refers to a certain shipment of 970 pounds of mattresses and box springs from Spokane to Missoula on which the first-class rate of $2.03 was charged. It proceeds: "If a similar shipment *were made* from Billings to Helena, the rate would have been $1.54 * * *" (Emphasis added.) Note that the similar shipment is purely hypothetical and the statement is in the subjunctive mode. Unless such shipments are found to have been made, there cannot be discriminatory prejudice. We think that a mere finding as to discrepancies in published rates without finding that shipments have been made in accordance with the differing rates are without significance. Numerous insufficient references of this kind are in the Commission's report. Thus the Commission compares rates on carloads of coal from Bearcreek, Montana, to Heron, Montana, a distance of 545 miles, with similar rates to

Clark's Fork, Idaho, 559 miles. We are not advised as to how many carloads of coal were shipped under these rates to these points or whether any carload of coal was ever shipped from Bearcreek to either Heron or Clark's Fork. Findings are made as to disparity in rates on molasses shipped from a sugar mill at Chinook, Montana, to Billings on the one hand, and to Idaho Falls, Idaho, on the other. The Court probably may take judicial notice of the fact that the Chinook factory is now located in the State of Washington.

But in any event, wholly apart from the matters mentioned, we adhere to our former holding that the findings as to preference and prejudice as between persons and localities will not sustain the general order now before us.

It will be noted that notwithstanding what the Supreme Court said in the Georgia Comm. case, supra, in North Carolina v. United States, supra, at page 513, the Supreme Court reaffirmed what it had said in Railroad Commission v. Chicago B. & Q. R. Co., 257 U. S. 563, to the effect that a general sweeping order against all intrastate rates may not be predicated upon findings of discrimination against particular localities and business groups made by the Commission under the clause about "persons" and "localities", which is a restatement of the Doctrine of the Shreveport case, 234 U. S. 342. As stated in Railroad Commission v. Chicago B. & Q. R. Co., supra: "In such a case, the saving clause by which exceptions are permitted, cannot give the order validity."

For the reasons stated, both here and in our former opinion, we find that the order, the findings and the report of the Commission, now before us, lack the essential determination and finding of fact to which we have previously referred, and that such lack is not supplemented by any of the matters herein referred to. In short, we find that the Commission has made no finding as to what amount of revenue, if any, was required from intrastate traffic in Montana to enable the railroads here affected to operate efficiently. Accordingly, for the reasons and on the grounds stated, both in this and in our former opinion, both of which are hereby adopted as the findings of this Court, we hold and conclude that the order here reviewed is not supported by the necessary findings of the Commission and that the same is void and in excess of the powers of the Commission. A permanent injunction will issue accordingly.

Dated this 13th day of August, 1952.

WALTER L. POPE
Circuit Judge

CHARLES N. PRAY
W. D. MURRAY
District Judges